RECENT DEVELOPMENTS

Marie v. Allied Home Mortgage Corp.

I. INTRODUCTION

The First Circuit Court of Appeals' recent decision in *Marie v. Allied Home Mortgage Corp.*,[1] regarding the division of labor between the court and the arbitrator has widened the circuit split in the interpretation of whether a judge or arbitrator decides certain issues in light of the landmark Supreme Court decision, *Howsam v. Dean Witter Reynolds, Inc.*,[2] and the more recent case, *Green Tree Fin. Corp. v. Bazzle*.[3] According to the First Circuit in *Marie v. Allied Home Mortgage Corp.*,[4] the issue of whether a party has waived its right to arbitrate due to conduct in litigation is a question that should be answered by courts, and not by arbitrators.[5] The First Circuit reiterated the Supreme Court's distinction of duties between judges and arbitrators borne of the *Howsam* and *Green Tree* decisions, holding that procedural issues should be left to the arbitrator, and substantive issues should be left to the court.[6]

Prior to *Howsam*, the traditional rule was that waiver of the right to arbitrate by conduct due to litigation-related activity was an issue for the court to decide.[7] The *Howsam* decision clarified that the court should decide substantive issues such as whether the parties are bound by a given arbitration clause, or whether a binding clause should be applied to a particular type of controversy.[8] The language of the decision, however, created confusion. The decision stated that many other types of claims, including "gateway questions" that might dispose of the entire claim, should be left to the arbitrator.[9] The ensuing subject of interpretation among the Circuit Courts is whether a party's waiver of the right to arbitrate, specifically where other litigation-related conduct allegedly constitutes the

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[1] Marie v. Allied Home Mortgage Corp., 402 F.3d 1 (1st Cir. 2005).

[2] Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79 (2002).

[3] Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444 (2003).

[4] *Marie*, 402 F.3d at 1.

[5] *Id.*; *see also First Circuit Deepens Split Over Arbitration Waivers*, ADRWORLD.COM, Mar. 21, 2005, http://www.adrworld.com/ (subscription required) (last visited Sept. 18, 2005).

[6] *Marie*, 402 F.3d at 10.

[7] *Id.* at 14.

[8] *Howsam*, 537 U.S. at 84.

[9] *Id.* at 84–85.

waiver, is one of those gateway issues; the question that the courts will grapple with interpreting post-*Howsam* is whether an issue is a substantive question for the court, or a procedural issue for the arbitrator.

Though few courts have considered the impact of *Howsam* and *Green Tree* on the doctrine of waiver of arbitration by conduct, there is disagreement among the circuits who have interpreted the Supreme Court decisions on the division of labor. The Eighth Circuit has held that the issue of waiver in light of *Howsam* and *Green Tree* is presumptively an issue for the arbitrator where the conduct allegedly constituting waiver is due to litigation in some other court.[10] The court held that "the presumption is that the arbitrator should decide 'allegations of waiver, delay, or a like defense to arbitrability.'"[11] In contrast, a panel for the Fifth Circuit has held that the issue of waiver by conduct is for the court, and not for the arbitrator, where the alleged waiver occurred due to conduct before the district court, particularly due to the court's comparative expertise.[12] In *Marie*, the First Circuit held that "the Supreme Court in *Howsam* and *Green Tree* did not intend to disturb the traditional rule that waiver by conduct, at least where due to litigation-related activity, is presumptively an issue for the court."[13]

II. FACTS AND PROCEDURAL HISTORY

Martha Marie began working for Texas-based Allied Home Mortgage Corporation on November 1, 2000 as a mortgage loan officer.[14] Her live-in boyfriend at the time, Joseph Thompson, was the branch manager of Allied's Woburn branch; he hired her and acted as her supervisor.[15] Marie agreed to the terms of compensation and employment, including an arbitration clause in her employment contract that was signed by her and by Thompson acting as Allied's representative.[16] The arbitration clause stated that both employer and employee agreed to submit to final and binding arbitration for any and all disputes, claims, and disagreements concerning both the terms of employment and termination.[17] Further, the clause enumerated the procedure

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[10] Nat'l Am. Ins. Co. v. Transamerica Occidental Life Ins. Co., 328 F.3d 462, 466 (8th Cir. 2003).

[11] *Id.* (quoting *Howsam*, 537 U.S. at 84 (citations omitted)).

[12] Tristar Fin. Ins. Agency, Inc. v. Equicredit Corp. of Am., 97 Fed. Appx. 462, 464 (5th Cir. 2004).

[13] Marie v. Allied Home Mortgage Corp., 402 F.3d 1, 14 (1st Cir. 2005).

[14] *Id.* at 4.

[15] *Id.*

[16] *Id.*

[17] *Id.*

for arbitration, stating that "[a]rbitration under this section must be initiated within sixty days of the action, inaction, or occurrence about which the party initiating the arbitration is complaining."[18] The agreement also stated that any arbitration was to be conducted under the rules of the American Arbitration Association ("AAA").[19]

On April 23, 2003, nearly three years after her employment commenced, Marie filed a charge of discrimination with the EEOC and with the Massachusetts Commission Against Discrimination ("MCAD") against Allied and Thompson alleging sexual discrimination in violation Title VII of the Civil Rights Act of 1964 ("Title VII") and applicable state law.[20] Specifically, Marie claimed that during her tenure with Allied, Thompson physically and verbally abused her because he thought she was having a sexual affair with another employee and Thompson wanted her to have sexual relations only with him.[21]

Allied filed a response to the charge on May 22, 2003. The EEOC issued a Dismissal and Notice of Rights shortly thereafter on July 18, 2003, stating that there was no finding of a Title VII violation, noting that Marie did not utilize Allied's sexual harassment policy.[22] But the dismissal stated that Marie did have a right to sue Thompson or Allied for sexual discrimination in federal or state court.[23]

In October of 2003, Marie filed a civil complaint in Massachusetts Superior Court, naming both Allied and Thompson as defendants.[24] In November, an amended complaint was filed that named both Allied and Thompson as defendants for assault and battery and sexual harassment under Title VII, and named Allied for negligent supervision of Thompson, breach of contract, and unjust enrichment.[25] Allied was served on November 20, 2003, and removed the action to federal district court in Massachusetts on December 9, 2003.[26]

On December 22, Allied filed a demand for arbitration with the AAA, which was within sixty days of being served. The following day, Allied moved to compel arbitration and to stay the court proceedings.[27] Marie

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[18] *Id.*

[19] *Id.*

[20] *Id.* at 4–5.

[21] *Id.* at 5.

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.*

opposed the motion, which was denied on January 8, 2004. The district court's order stated that the initiation of arbitration proceedings occurred more than sixty days after the conclusion of the proceedings before the EEOC, thereby falling outside of the parameters of the arbitration clause as laid out in the adhesion employment contract.[28] Allied, in turn, moved to dismiss Marie's complaint as untimely, or, in the alternative, to reconsider the denial of the motion to compel arbitration and to stay court proceedings.[29] The district court denied the motion as to each alternative, stating that the terms of the adhesion contract would be strictly construed against the party that wrote it, and holding that Allied had waived its right to arbitrate the claims due to unreasonable delay, and thus the lawsuit would proceed.[30]

Allied filed a notice of appeal to the U.S. Court of Appeals for the First Circuit as to the district court's order denying the motion for reconsideration of the denial of Allied's motion to compel arbitration.[31]

III. THE COURT'S HOLDING AND REASONING

The First Circuit held that the issue of waiver of the right to arbitrate due to inconsistent activity in another litigation forum remains an issue for the court, even in light of the U.S. Supreme Court's holdings in *Howsam* and *Green Tree*.[32] The court looked to Supreme Court and First Circuit precedent to reason that the recent Supreme Court decisions considering the distinction of powers did not disturb the traditional view that decisions of waiver in this court-related context should be left to the court.[33]

On the merits, the court held that an employer does not waive its right to arbitration by failing to demand arbitration during the pendency of an EEOC investigation,[34] based in part on the Supreme Court's decision in *EEOC v. Waffle House, Inc.*,[35] holding that an employer cannot preclude the EEOC from bringing an enforcement action based on an employee's complaint by relying on an arbitration clause between the employee and employer.[36] After

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[28] *Id.*

[29] *Id.*

[30] *Id.* at 5–6.

[31] *Id.* at 6.

[32] *Id.* at 3. The court noted that the issue of compliance with a contractual time limit should, in the first instance, be addressed by the arbitrator.

[33] *Id.* at 3–4.

[34] *Id.*

[35] EEOC v. Waffle House, Inc., 534 U.S. 279 (2002).

[36] *Id.*

finding jurisdiction to review the district court's initial order denying Allied's motion to stay proceedings and compel arbitration, the court reversed the decision of the district court, and remanded to the lower court for a finding consistent with its decision.[37]

A. *The First Circuit's Reliance on Precedent Regarding the Division of Labor*

The court noted that certain presumptions have been constructed to aid in the division of labor between court and arbitrator, and that these presumptions hold "in the absence of clear and unmistakable evidence to the contrary."[38] Furthermore, the court noted that any doubt concerning the arbitrability of an issue should be resolved in favor of arbitration given the pro-arbitration policy of the Federal Arbitration Act ("FAA").[39]

The court reviewed the Supreme Court's decision in *Howsam*, where the Court held that the issue of whether an arbitration claim was barred by a six-year limitations period, when it was enumerated in the arbitration rules and agreed upon by the parties was an issue for the arbitrator, not the court.[40] The *Howsam* decision stated that two sorts of questions are presumptively for the court to decide: (1) whether the parties are bound by a given arbitration clause, and (2) whether a concededly binding arbitration clause applies to a particular type of controversy.[41] The *Howsam* Court held that many other types of claims are for the arbitrator to decide, including some "gateway questions" that might dispose of the entire claim.[42] The First Circuit noted that the framework that has developed post-*Howsam* reserves procedural issues for the arbitrator, and substantive questions about the kind of disputes intended for arbitration for the court.[43]

The court went on to review the Supreme Court's more recent decision in *Green Tree*, which held that whether an arbitration agreement allowed for class arbitration was an issue of contract interpretation for the arbitrator rather than the judge.[44] The *Green Tree* decision reaffirmed the framework established in *Howsam*, holding that because the issue went to what kind of

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[37] *Marie*, 402 F.3d at 17.

[38] *Id.* at 9 (quoting *Green Tree*, 539 U.S. at 452).

[39] *Id.* (citing Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24–25 (1983)).

[40] Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 85–86 (2002).

[41] *Id.* at 84.

[42] *Id.* at 85–86.

[43] *Marie*, 402 F.3d at 10.

[44] Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 452–53 (2003).

arbitration proceeding the parties had agreed to, rather than whether they agreed to arbitrate, the issue was presumptively for the arbitrator to decide.[45] The court noted that both Supreme Court decisions stressed the issue of comparative expertise, and the presumption that parties intend to give their disputes to the most able decisionmaker on a given issue.[46]

In reviewing the First Circuit's interpretation of these Supreme Court decisions, the court looked to two recent decisions regarding the division of labor. In *Shaw's Supermarkets, Inc. v. UFCW, Union Local 791*,[47] the First Circuit held that the question of whether multiple grievances being arbitrated separately should be consolidated into a single arbitration was a procedural matter that was presumptively for the arbitrator.[48] In *Richard C. Young & Co. v. Leventhal*,[49] the court held that a forum-selection clause in an arbitration clause was a procedural question left for the arbitrator to determine.[50] Neither First Circuit decision addressed the waiver issue due to litigation-related activities in light of *Howsam* because it was not raised by any party until *Marie*.

1. *Contractual Timeliness to be Decided by the Arbitrator*

Relying on the above Supreme Court and First Circuit precedent, the court held that in the present case, the contractual timeliness issue is for the arbitrator, but that the issue of waiver by conduct is for the court.[51] The court held that the district court erred in interpreting the contractual time limit clause and applying it to Allied, referring to the precedent set in *Howsam* that this sort of procedural prerequisite is presumed to be for the arbitrator.[52] The court added that "[t]he arbitrator might be expected to have comparative expertise in determining the meaning of these sorts of contractual limitations provisions in light of the background norms in this employment area."[53]

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[45] *Id.* at 452.

[46] *Marie*, 402 F.3d at 11 (citing *Howsam*, 537 U.S. at 84–85; *Green Tree*, 539 U.S. at 453).

[47] Shaw's Supermarkets, Inc. v. UFCW, Union Local 791, 321 F.3d 251, 252 (1st Cir. 2003).

[48] *Id.* at 254.

[49] Richard C. Young & Co. v. Leventhal, 389 F.3d 1, 1 (1st Cir. 2004).

[50] *Id.* at 4–5.

[51] *Marie*, 402 F.3d at 11.

[52] *Id.* (citing *Howsam*, 537 U.S. at 84–85).

[53] *Marie*, 402 F.3d at 11.

2. *Waiver to be Decided by the Court*

The court restated the argument for waiver, stemming from the fact that Allied participated in the EEOC proceedings initiated by Marie without making the demand for arbitration during or after the proceedings, thereby demonstrating conduct that is inconsistent with the desire to arbitrate its claims.[54] The court noted that it has had a long history of deciding such waiver claims, and that the court has previously held that the issue of waiver due to litigation-related activity is presumptively for the judge and not the arbitrator.[55] The court referred to the text of the FAA, noting that a court is only permitted to stay a court action pending arbitration if "the applicant for the stay is not in default in proceeding with such arbitration,"[56] and a "default" has generally been viewed by courts as including a waiver.[57] The court concluded that the FAA language places a statutory command on courts in cases where a stay is sought to decide the waiver issue themselves.[58]

In addition, the court referred to the *Howsam* Court's reliance on the Revised Uniform Arbitration Act of 2000 ("RUAA"), which establishes that procedural issues are generally for the arbitrator and substantive issues for the court.[59] The court noted that the same section of the RUAA that the *Howsam* Court quoted treats waiver as an issue for the court: "Waiver is one area where courts, rather than arbitrators, often make the decision as to the enforceability of an arbitration clause."[60] The court went on to enumerate various policy reasons why the court, and not an arbitrator, should decide waiver issues where the waiver is due to litigation-related activity, including: comparative expertise considerations such as a judge's ability to recognize forum shopping; the fact that the inquiry implicates judicial procedures; and the fact that the procedural waiver issue is not likely to be intertwined with the merits of the dispute, which should be left to the arbitrator to determine the outcome of the dispute.[61]

Finally, the court noted that it would be exceptionally inefficient to send a waiver claim to an arbitrator because if the arbitrator found that the

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[54] *Id.* (citing Menorah Ins. Co. v. INX Reinsurance Corp., 72 F.3d 218, 220–21 (1st Cir. 1995)).

[55] *Marie*, 402 F.3d at 12 (citing *Menorah*, 72 F.3d at 222; Jones Motor Co. v. Chauffeurs, Teamsters & Helpers Local Union No. 633, 671 F.2d 38, 43 (1st Cir. 1982)).

[56] *Marie*, 402 F.3d at 12–13 (citing 9 U.S.C. § 3 (2000)).

[57] *Id.* (citations omitted).

[58] *Id.* at 13.

[59] Revised Uniform Arbitration Act § 6, cmt. 2, 7 U.L.A. 14–15 (Supp. 2004).

[60] *Id.* at 17.

[61] *Marie*, 402 F.3d at 13 (citations omitted).

defendant waived its right to arbitrate, the case would end up back before the district court, "bounc[ing] back and forth between tribunals without making any progress."[62] The court concluded that the Supreme Court in *Howsam* and *Green Tree* did not intend to upset the traditional rule that waiver by conduct, at least where due to litigation-related activity, is presumptively an issue for the court.[63]

IV. CONCLUSION: THE IMPACT OF THE FIRST CIRCUIT'S HOLDING

Due to the inconsistent nature of the language of *Howsam* and the traditionally prevailing view that issues of waiver based on participating in litigation were to be decided by the court, scholars have speculated that this issue of division of labor may come before the Supreme Court. University of Missouri-Columbia School of Law Professor Richard C. Reuben speculated that because the line between the court's statutory authority to decide questions under the FAA and the courts' procedural arbitrability doctrine is not clear, the split will deepen as more appellate courts get the question, and there will be a strong need for the U.S. Supreme Court to tackle the issue.[64]

Lori Turner

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[62] *Id.*

[63] *Id.* at 14.

[64] *First Circuit Deepens Split Over Arbitration Waivers*, *supra* note 6, at 1.